A NON-NATURALIST ACCOUNT OF LAW'S PLACE IN REALITY*

George Pavlakos

ABSTRACT:

This chapter aims to outline the contours of a non-naturalist account of legal phenomena. Although it does not address the relevance of cognitive sciences to law specifically, the argument developed here aims to demonstrate that the said relevance depends on the antecedent question about the requirements of explanation of legal phenomena in terms of non-legal, more basic facts. By demonstrating the failure of naturalistic facts to meet the requirements of explanation, the chapter calls into question the relevance of cognitive science to law. In the first part I propose to understand naturalism in law as an explanatory claim about the (metaphysical) determinants of legal facts. Then I explore a family of objections against physicalism in the philosophy of mind (epistemic gap arguments) and argue that they apply equally to naturalistic explanations in the legal domain. But there is a key disanalogy between the two domains: while in the philosophy of mind explanatory gap arguments show that mental phenomena involve fundamental, non-physical facts, which are explanatorily basic, in the legal domain explanatory gap arguments show that the explanation of legal facts requires us to appeal to additional non-naturalistic facts which can bridge the gap of explanation between the legal facts and their non-legal determinants. I discuss briefly two versions of legal non-naturalism and proceed to develop the one that is based on Kelsen's account of legal cognition which, as it turns out, is surprisingly compatible with the ground-theoretic debates in contemporary metaphysics.

Keywords: Non-naturalism in law; law-determination; metaphysical explanation; legal content; Hans Kelsen

1. Legal naturalism as a metaphysical thesis

* I am grateful to the editors for inviting my contribution to such a timely volume. Jaap Hage has provided rigorous and detailed feedback on an earlier draft, which led to considerable improvement of the text. Carsten Heidemann has prompted me to think hard about the success of a ground-theoretic reconstruction of Kelsen's theory of law. If I continue to stand by the fruitfulness of the project, it is because his challenging criticisms have strengthened my intuition that Kelsen was involved in the same enterprise that today goes by the name of metaphysical explanation. Samuele Chilovi has been an intellectual companion over the last three years and our collaboration, apart from being pure fun, has opened fresh pathways for my own thinking; several of this chapter's ideas would not have been possible without his input to our collaborative venture. Finally, I wish to thank the editors of *Revus* for allowing me to use portions of (Pavlakos, 2019) in the second part of the chapter.

For the present purposes, I shall understand legal facts as facts about the content of the law in a given legal system at a given time. E.g. 'it is the law in Greece that the police cannot enter University grounds unless a special permission has been granted by the Senate'; or 'According to UK law, killing is forbidden'.[1] While it is uncontroversial that legal facts obtain in the actual world, given that law is a derivative feature of reality, we may ask what it is, in virtue of which such facts obtain. The question involves two further sub-questions: a) What is the relevant relation of dependency between law and its determinants? b) Which determinants does the relation pick out? As to the first sub-question, I have argued elsewhere (Chilovi & Pavlakos, 2019) that the relation between legal facts and their determinants is better understood as one of *metaphysical grounding*, a view that seems to be widely shared in the recent literature (Greenberg, 2004; Rosen, 2010; Plunkett 2012). Although answers to the second sub-question about the determinants of legal facts abound, a theoretically interesting dividing line, which coincides with traditional debates, involves the question whether the determinants of law are entirely descriptive or partly moral in kind.[2]

Embracing a unifying standpoint, I suggest to understand naturalism about the law as comprising accounts of legal facts in terms of more fundamental, descriptive facts of both a social and physical nature: facts about social practices and collective actions, mental states and attitudes; but also physical facts about the brain and other physiological states of the relevant agents[3]. Although such an inclusive notion of legal naturalism might evoke disbelief, there exist reasons to suggest its fruitfulness. Adopting a convention for the limited purposes of this chapter, I shall understand legal naturalism to encompass any broadly naturalist strategy in legal theory.

Accordingly, the naturalist project, as understood for the present purposes, contains two aspects: on the one hand legal naturalism is a metaphysical thesis about the determinants of legal facts; on the other it aims at an explanation of legal facts. In what sense is legal naturalism a metaphysical thesis? In the sense that it advances a claim about how more fundamental, non-legal facts determine or constitute facts about the content of the law. Given that legal facts are not fundamental parts of the social and physical environment, a question arises about which (simpler) facts make them what they are. This question

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1 For the purposes of the present discussion I adopt the following working definition of a legal fact (LF): "for every proposition p, system s, if p is law (valid) in s, we can we state truly that it is a fact that p is law in s, or that s validates p, and call this a 'legal fact'". The formulation goes back to work I have developed together with Sam Chilovi in (Chilovi & Pavlakos, 2019, pp. 71-74).

2 For the distinction between descriptive and non-descriptive facts see also n 16, this chapter.

3 This inclusive definition purports to capture both positivist accounts of legal facts but also any conceivable strongest, 'physicalist' account of legal facts. Typically, in the case of law, a physicalist thesis would be one about the physicalist nature of the mental states, dispositions and attitudes which play the role of determinants of legal facts. The case of such strong physicalism about the law would probably require the truth of some version of legal positivism which argues that the determinants of law include such facts as are amenable to reductive, physicalist explanations.

concerns the *grounding relation* that obtains between different levels of reality: the less fundamental level of legal facts (the grounded facts) and the more fundamental level of their constituents (the grounds):

> '[…] law is clearly not a fundamental feature of reality. If, say, it is the law in the United States that one ought to drive on the right-hand side of the road, or that one may freely walk on hills at night, this must be so in virtue of other, more fundamental things. Law being derivative, it owes its existence to more basic entities; it depends on them. Correlatively, when someone wants to find out what the law is, an adequate way of doing so would involve precisely appealing to those things that the law is determined by.' (Chilovi & Pavlakos, 2019, p. 54)

The grounding relation is a *metaphysical* one because it tracks the dependency of some non-fundamental fact from a collection of more fundamental facts; this dependency is commonly expressed by saying that the grounded fact obtains 'in virtue of' its grounds. Accordingly, and adopting a somewhat sketchy classification, any legal theory that takes descriptive facts of a social or physical nature to be the immediate grounds[4] of legal facts will be classified as naturalist.[5]

Additionally, the 'in virtue of' relation has an *explanatory* ambition: just as causal explanation aims to explain something *because of* something else, stating the obtaining of some fact *in virtue of* its determinants involves an explanatory operation. The explanatory ambition of grounding is a common theme both in general metaphysics and recent legal theory. Metaphysicians employ the ground theoretic apparatus in order to move beyond relations which merely depict patters of correlation among facts of different levels of fundamentality (Kim, 1993, p. 167). Leading authors such as Fine, Schaffer and many others who are involved in the debates about consciousness agree that relations of metaphysical dependency are able to play an explanatory role (Chilovi & Pavlakos, 2019; Dasgupta, 2017; Fine, 2001; Litland, 2017; Audi, 2012; Schaffer, 2016; Wilson, 2017). Similarly, in the philosophy of law, Greenberg has emphasised the link between metaphysical determination and explanation by formulating the condition that anything that counts as a ground of a legal fact must also explain it (Greenberg, unpublished MS).

Notably, a key effect of the explanatory dimension of grounding is that it imposes demands on any substantive view which is advanced as a correct metaphysical account of the facts in a domain. To that extent, the demands of explanation are of a general value and can be used to appraise a wide range of

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4 For the notion of an immediate ground, see (Correia & Schnieder, 2012, pp. 25-28).

5 Jaap Hage in (Hage, present volume) adopts an equally inclusive understanding of naturalist legal theories.

metaphysical accounts. For our present concerns, it is of particular significance that a violation of the explanatory demands of grounding would undermine the truth of legal naturalism, as a view that aims to account for deep explanations of legal phenomena. Let me next turn to an explication of the explanatory demands of grounding and a discussion of their demandingness.

2. The demands of explanation[6]

The demands stemming from the explanatory dimension of grounding presuppose a link between grounding and explanation, which can be formulated as the requirement that if a collection of facts D fully determines some fact F, then D must also explain how F obtains. Given this requirement, each of the facts in D must contribute to an explanation of F, while the full ground D must provide a complete explanation of F. Further, the requirement posited by the link helps to elucidate the general structure of a valid argument against the success of naturalist claims. A brief survey of the relevant philosophical literature will be of help at this juncture.

Notably, explanatory gap arguments have been deployed in the philosophy of mind to argue against physicalism as the (metaphysical) claim that mental facts are determined by, and are nothing over and above, physical facts. Arguments that belong to this family include Chalmers' conceivability argument (Chalmers, 1996) and Jackson's knowledge argument (Jackson, 1986). These arguments have a common structure: (i) they start by establishing an epistemic gap between physical and mental (phenomenal) truths, by establishing the failure of a kind of epistemic entailment (specifically, of *a priori* entailment) from the physical to the mental; (i) then they argue that the epistemic gap implies a corresponding metaphysical gap; finally, (iii) they conclude that there is a metaphysical gap between the physical and the mental, and hence that physicalism is false. The shape of the argument is then the following (Chalmers, 2010, p. 110):

(1) There is an epistemic gap between physical and phenomenal truths

(2) If there is an epistemic gap between physical and phenomenal truths, then there is a metaphysical gap and physicalism is false

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3) Physicalism is false

[6] This section draws on common work which I have developed with Samuele Chilovi in (Chilovi & Pavlakos, 2019) and (Chilovi and Pavlakos, in preparation).

Chalmers' and Jackson's arguments can be viewed as specifying different sorts of epistemic gaps, and different arguments in favour of the existence of such gaps. Let me visit them in turn.

Chalmers (1996) argues from a premise about conceivability and a premise that links conceivability with metaphysical possibility, to the negation of physicalism. Schematically, where P is the conjunction of all microphysical truths about the actual world, and Q an arbitrary phenomenal truth about the world:

(1) It is conceivable that P&¬Q.

(2) If it is conceivable that P&¬Q, it is metaphysically possible that P&¬Q.

(3) If it is metaphysically possible that P&¬Q, then physicalism is false.

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(4) Physicalism is false.

This argument says that if it is conceivable that there be a world that is physically indiscernible to ours but that lacks some actual phenomenal truth, and if this suffices for there to be a metaphysically possible world with those features, then physicalism should be false. A world that duplicates all the physical features of actuality while lacking some actual phenomenal features is a "zombie world".

The epistemic gap at work in the argument consists in the fact that one can rationally conceive of P without Q, *as per* premise (1). So one is not required to conceive Q upon reflectively conceiving P: the epistemic entailment fails. The thesis that a zombie world is conceivable thus involves the idea that such a world is coherent under rational reflection, that it does not result in any contradiction: an ideal reasoner with complete physical knowledge of the actual world would not be bound to conclude that there are no zombies. In other words, P is conceivable if it cannot be known *a priori* to be false, or be ruled out. So, the relevant notion of conceivability is a broadly epistemic one.

Relatedly, Jackson's knowledge argument (Jackson, 1986) constitutes a further way of arguing from epistemological premises to metaphysical conclusions. His argument starts with the claim that the violation of an epistemic constraint has a certain metaphysical impact (it leads to the falsity of physicalism), and then claims that the constraint is indeed violated. The relevant epistemic constraint here is one of deducibility: phenomenal truths are not (a priori) *deducible* from physical truths, even by a perfect reasoner. In the case Jackson famously invites us to imagine, Mary is a scientist with unrestricted deductive powers and who has complete knowledge about the physics of colour and colour vision, but who has lived all her life in a black-and-white room. Despite all her physical knowledge and inferential abilities, it seems that there is something Mary doesn't know: what it's like to see red. Thus, for all her

physical knowledge, she lacks phenomenal knowledge since she cannot deduce the latter from the former.

The form of the argument is the following:

(1) If there are phenomenal truths that are not deducible from physical truths, then physicalism is false.

(2) There are phenomenal truths that are not deducible from physical truths

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(3) Physicalism is false

Finally, returning to the legal domain, we encounter a parallel strategy in the argument Greenberg (Greenberg, 2004; 2006a; 2006b) deploys against the view that legal facts are grounded in descriptive social facts.[7] The argument involves an epistemic constraint on law-determination, together with the contention that descriptive social facts on their own fail to satisfy this constraint because of an explanatory gap between the legal and whatever counts as the domain of non-legal explanantia. A putative formulation of his argument, adjusted to the context of naturalism, might take the following shape:

(1) If a collection of facts D fully grounds a legal fact L, then D must generate a complete explanation of L

(2) There is an explanatory gap between legal facts and social and physical facts

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(3) Legal naturalism is false

3. The epistemic dimension of explanatory gaps

A key element of the strategies explored earlier was the formulation of the explanatory gap argument, both in the domain of mind and law, in *strong epistemic terms*. The epistemic gloss of explanation represents the gap as resulting from the inability to transition between two epistemic states (i.e. states of knowledge or belief). Thus, in the case of consciousness, the gap results from the inability to derive

[7] The type of determination that is implicit in Greenberg's discussion is constitutive (rather than causal or merely modal) in character. Given current developments in metaphysics that cash out constitutive determination in a grounding-based terms, the epistemic argument against positivism can thus be re-interpreted as involving the contention that the *grounding* of legal facts is subject to an epistemic constraint. For a ground-theoretic reconstruction of Greenberg's law-determination see (Chilovi & Pavlakos, 2019).

knowledge of a conscious state from knowledge of a collection of physical facts. Similarly, in the legal domain, the gap is located in the inability to derive knowledge of a legal fact from a collection of descriptive facts.

This inability points to a key requirement of successful explanation: the transparency between the epistemic state that plays the role of the *explanans* and the one that plays the role of the *explanandum*. Accordingly, the *epistemic constraint* of metaphysical explanation can be formulated as follows: [8]

EC: If a collection of facts D fully grounds a legal fact L, one can in principle deduce (knowledge of) L from (knowledge of) D.

Given EC, there emerges a particularly helpful way of understanding the explanatory gap; i.e. to represent it as an instance of an inferential failure to derive the target concept of the explanation from the concepts depicting the *explanatia*. This meets with support from the phenomenology of legal interpretation: in everyday legal practice lawyers employ legal reasoning with an eye to 'working out' the content of the law from the more fundamental concepts that depict its grounds (Greenberg, 2004).

The epistemic dimension helps clarify the gap in an instructive way, by relating the failure to derive knowledge of the facts in a domain to the inability to determine which among several possible interpretations of the target concept is the correct one. We know from Kripke's discussion (Kripke, 1982) of Wittgenstein's rule-following considerations – for brevity *Kripkenstein* – that the said inability can be modelled as the discrepancy between normatively determinate applications of a concept and the putative descriptive determinants of such applications. This rendering carries special force within the legal domain, in particular with respect to naturalist accounts of the content of the law. Kripkenstein, operating in a cognate context of philosophical enquiry,[9] suggests that the epistemic gap between the correct application of a concept and its determinants gives rise to a paradox: The example concerns a person who had added correctly two natural numbers, 57 and 68, which exceed the range of numbers previously added by the same person. The sceptic's challenge is to explain what makes it the case that the person meant addition (and, hence, applied the function correctly) as opposed to meaning quaddition, where quaddition is a function exactly similar to addition up to the point one of the arguments reaches 57, from which point onward the function's value becomes 5. Disturbingly, any

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[8] I limit the scope of the formulation to the legal case. See our discussion in (Chilovi & Pavlakos, in preparation) and (Greenberg, unpublished MS).

[9] Namely the context of discussing the determinants of semantic facts (facts about the meaning of words/concepts) in the later work of Ludwig Wittgenstein.

attempt to answer the sceptic, through reference to the past history of applying addition, collapses because any such reference can be made consistent with the meaning of quaddition.

The paradox arises, *pace* Kripkenstein, because a key condition for any account of the meaning of a concept is that concepts be understood as normative in a strong sense;[10] i.e. that they be understood as rules or standards which guide rational thought and language. Yet, there is nothing in the collection of descriptive facts that constitute the past practice of applying a concept[11] which could determine the unique course of action[12] recommended by the relevant target concept. Thus, the source of the epistemic gap lies in the *epistemic possibility to have multiple mappings from the same set of descriptive facts of past practice to different meanings* for any single collection of such facts is logically compatible with different interpretations of the target concept that is at stake. Whether a course of action is prescribed by the relevant concept cannot be determined merely by reference to facts of past practice (Wittgenstein, 1953, §201). Kripkenstein, in raising the sceptical paradox, points to a key feature of explanations that involve facts of different levels of fundamentality, as is the case with legal facts and their determinants. In such contexts, it is opaque as to why the obtaining of the source is linked to the obtaining of the result given that it is logically possible that the source obtains without the result obtaining.[13] Opacity accounts for the explanatory gaps which undermine complete explanations of the target domain (in our case, legal facts). Here is a useful definition:

Explanatory Gap: There is an explanatory gap between source and result if and only if it is opaque why the obtaining of this particular source is linked to the obtaining of that particular result (as opposed to some other result, or no result at all) (Schaffer, 2017, p. 3).

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[10] Arguably, understanding concepts as strongly normative grounds the epistemic dimension of explanation. Only under the assumption that concepts are normative in a strong sense is it possible to understand the grounds of a target domain as 'reasons' for the obtaining of the facts in the domain; see, (Hattiangadi, 2007, pp. 3-4; Ginsborg, 2018). In this spirit, (Chilovi and Pavlakos, in preparation) offer a detailed discussion of epistemic rationality and the requirement that the grounds of legal facts be epistemic reasons. Cf. with (Brożek, 2013) who argues for a weak normativity of concepts and uses it to develop a naturalistic solution to the rule-following paradox.

[11] For reasons of simplicity, I include in the facts of practice any of the facts deemed inert by Kripkenstein in determining the meaning of a concept: i.e. all the physical and psychological facts involved in past instances of the relevant practice.

[12] The 'course of action' referred to here is, in the first instance, action with respect to the inferential moves guided by the concept. To this extent, the Wittgensteinian view I am discussing assumes that all concepts are 'practical' or 'action-guiding' in that minimal sense. Obviously, any evaluative concept will also have additional practical impact.

[13] I am paraphrasing a definition offered by (Schaffer, 2017, p. 4). In doing so, I restrict the scope of opacity to logical possibility, leaving out cases of *a priori* entailment and conceivability, which are also discussed by Schaffer.

This, then, is the argument against legal naturalism, stated in full: One cannot deduce knowledge of facts of legal content (L) from knowledge of descriptive facts about social practices (D) because it is *epistemically possible to have multiple mappings from the same collection of descriptive facts to legal content.* Therefore, there is an explanatory gap, D does not fully ground L, and legal naturalism is false.

4. Non-naturalist strategies in law

Notably, the epistemic gap argument in law draws a different conclusion than the cognate arguments in the domain of mind. In a nutshell, failure to deduce knowledge of legal facts from descriptive non-legal facts has been understood as suggesting a shortcoming at the level of the putative explanantia (i.e. the relevant descriptive non-legal determinants) rather than requiring a revision of the way we conceive the explananda (i.e. the legal facts).

Accordingly, proponents of such arguments in the philosophy of mind take the epistemic gap to imply an ontological gap and thus argue that the grounded facts are not amenable to explanation, hence they are ontologically fundamental.[14] In contrast, the moral Greenberg draws for the legal domain (Greenberg, 2004) is that the grounding facts need to be supplemented by adding additional facts *of a different kind* to the inventory of descriptive social facts, which positivism takes to compose the grounding base of explanation.[15] Doing so will, in turn, resolve the indeterminacy of the possible deviant mappings and allow us to perform correct derivations from the base facts to the legal facts they ground. Further, Greenberg proceeds to argue that the additional facts that are required are value facts, ultimately helping himself to a non-naturalist position.

I turn next to discuss the consequences of the epistemic constraint on the explanation of legal facts for non-naturalist strategies in legal theory. Broadly speaking, we can distinguish between two non-naturalist strategies in the literature: the *additional grounds* strategy and the *bridging the gap* strategy. I shall discuss a paradigmatic instance of each strategy without passing a conclusive judgment about which strategy wins.

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[14] With regard to mental facts see (Chalmers, 1996; Jackson, 1986; and Levine, 1983). It should be added that the result is yet different with respect to the domain of meaning, where epistemic gap arguments are taken to support some version of eliminativism about the grounded facts: i.e. the claim that semantic facts do not really exist. See the sceptical reading of (Kripke, 1982) and the very perceptive analysis of Kripke's account in (Hattiangadi, 2007).

[15] Without going into a justification of the different route taken in law, an obvious explanation is the implausibility of deeming legal facts either fundamental components of reality, in the way Chalmers and Jackson take phenomenal facts to be, or non-existent, in the strong sense Kripke holds semantic facts to be non-existent.

First, the *additional grounds* non-naturalism. This strategy takes the lesson of the epistemic constraint as recommending the broadening of the grounding base of the explanation of legal facts. In other words, the strategy runs, if one cannot derive knowledge of the target domain (law) from the knowledge of any amount of descriptive facts, then no collection of descriptive facts can fully ground the legal facts. *E contrario* one must arrive at the full grounding base by adding to the relevant descriptive facts a collection of non-descriptive facts[16] which can meet the demands of the epistemic constraint. Prominent in respect of this strategy is Mark Greenberg's account of law determination.[17]

Although it cannot be discussed here in full, an evident objection to this strategy would challenge the capacity of the expanded grounding base to meet the epistemic constraint. In other words, it would remain uncertain how the addition of, say, moral facts to a collection of descriptive facts D would enable the resulting collection of facts D* to epistemically necessitate the inference from the knowledge of D* to the knowledge of some target legal fact. To recall Kripkenstein's argument from earlier, given the possibility of multiple mappings from a collection of facts to legal content, it is not clear how by adding further facts of any kind to the grounding base would close the gap of the explanation.

5. Kelsenian non-naturalism

Bridging the gap non-naturalism is the second strategy. Roughly put, this strategy looks for an intermediary or a *bridge* in virtue of which the epistemic gap between legal facts and their grounds can be joined. In exploring this option, I shall turn to a long-standing account of law from the first half of the 20th century, Hans Kelsen's Pure Theory of Law. While Kelsen's non-naturalism has long been recognized and discussed in the literature, no-one to my knowledge has discussed it in ground-theoretic terms.[18]

The extent to which Kelsen's account of law is cast in language that is compatible with the contemporary ground-theoretic debates in legal theory is astonishing. To begin with, Kelsen identified legal norms as the object of cognition of the Pure Theory of Law, his rendering of legal science, and sought to preserve the independence[19] of the realm of legal objects (norms) from both non-normative, brute facts and value-

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16 As an aide-memoire: descriptive facts will typically include physical and social facts whereas non-descriptive will comprise deontic, moral and other evaluative facts broadly conceived.

17 In his wide-ranging paper 'Are the cognitive sciences relevant to law?' Jaap Hage advances a constructivist account which involves non-legal normative facts in the explanation of legal facts (Hage, present volume). Although he claims that such constructivist facts are ultimately grounded on social facts of acceptance it is not clear that his account does not help itself to 'acceptance-independent' value-facts, such as moral or prudential reasons for action. Thus, Hage's view seems to me to be better characterized as a version of *additional grounds* non-naturalism. Either that, or it fails to generate the requisite explanation of legal facts.

18 The only exception is an earlier attempt I made in (Pavlakos, 2019), which is however incomplete. For a discussion of Kelsenian non-naturalism that sets it into the context of the history of ideas see (Paulson, 2018).

19 The independence referred to in this context is primarily epistemic, not metaphysical, for Kelsen recognises that law is not independent of the realm of naturalistic facts (Kelsen, 1992, p. 8). However, given the priority of epistemology over metaphysics, which occupies a central position within Neo-Kantian philosophy, questions

facts. But the independence of the realm of legal norms from both fact and value is accompanied by two explanatory challenges: first, to explain[20] how knowledge of a set of non-normative psychological and physical facts can generate knowledge of legal norms. Second, to explain *that* knowledge without making reference to any robust value facts.

The first challenge relates to the non-fundamental nature of legal facts and arises because:

> '[…] at least part of the essence of the law […] appears to occupy the realm of nature, to have a thoroughly natural existence. If one analyses a parliamentary enactment, say, or an administrative act […] one can distinguish two elements. There is an act perceptible to the senses, taking place in time and space, an external event […] And there is a specific meaning, a sense that is, so to speak, immanent in or attached to the act or event." (Kelsen, 1992, p. 8)

Accordingly, Kelsen shares the contemporary view that legal norms are not fundamental but depend on more basic facts,[21] which are available to the senses. 'How do more fundamental, non-normative facts contribute to/determine legal norms?' this is the key explanatory task for legal science in general, and more specifically to the Pure Theory of Law.

Kelsen's understanding of a legal norm fits quite closely with the working definition of a legal fact that was suggested earlier.[22] Kelsen explains the contribution of more fundamental facts in terms of meaning or content: the same set of facts can be interpreted in an objective or in a subjective way, out of which only the former corresponds to the content of a legal norm. The norm-creating acts of the Captain of Köpenick, Kelsen's proverbial figure of the impostor, possess only a *subjective* meaning; in contrast, an identical act issued by a government official acting within her powers possesses the *objective* meaning of a (legal) norm. It is this objective meaning, attached to the relevant set of non-normative facts, which explains how these contribute to or determine the content of legal norms. To that extent, the explanatory task obtains – also for Kelsen – between facts about the content of the law and their (more fundamental)

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concerning the existence-conditions of things are treated as addressing conditions for making valid judgments about those things. For the main tenets of Neo-Kantianism see the excellent discussion in (Heidemann, 2013).

[20] Kelsen contrasts the explanation he is interested with causal explanation. While there is insufficient textual evidence that he was engaged in strict constitutive explanation, it is plausible to attribute the key tasks involved in this type of explanation to him. I aim to develop this point in more detail in future work but will assume its truth for the present purposes.

[21] Kelsen is not very precise in his use of the term 'fact', which seems to include both the naturalistic facts that arise in the context of intentional action, such as acts of will and their expressions, but also facts of social practice, such as the doings and sayings of legal officials. Since nothing much turns out for my account on introducing more fine-grained distinctions, I will understand 'fact' to include all of the above.

[22] n. 1, this chapter.

determinants. And relatedly, facts about 'the objective meaning of the law' can be readily understood as facts 'about the content of the law'.

Instructively, Kelsen took subjective meaning to consist in any meaning attached to facts by their authors, including the meanings conferred on them by such normative orders as morality, ethics and religion. In contrast, objective or legal meaning requires a specifically legal cognition:

> 'External circumstances are always a part of nature, for they are events perceptible to the senses, taking place in time and space; and, as part of nature, they are governed by causal laws […] what makes such an event a legal (or an illegal) act is not its facticity, not its being natural but […] its meaning, the objective sense that attaches to the act. The specifically legal sense […] comes by way of a norm whose content refers to the event and confers legal meaning on it […] The norm functions as a scheme of interpretation.' (Kelsen, 1992, p. 10)

Thus, the object of legal cognition (objective meanings or norms) presupposes the activity of legal science, while legal cognition cannot have as its object anything but legal norms:

> 'To comprehend something legally can only be to comprehend it as law […] To characterize acts occurring in nature as legal is simply to claim the validity of norms whose content corresponds in a certain way to that of actual events.' (Kelsen, 1992, p. 12)

In this way, validity becomes the special mode of the existence of legal norms, in a manner that draws a strict separation between the realm of fact and the normative sphere of legal norms:

> 'To speak […] of the validity of a norm is to express […] the specific existence of the norm, the particular way in which the norm is given, in contradistinction to natural reality, existing in time and space. The norm as such, not to be confused with the act by means of which the norm is issued, does not exist in space and time, for it is not a fact of nature.' (Kelsen, 1992, p. 12)

5.1 Facts about the content of the law

Notably, Kelsen's discussion provides an important insight to the contemporary debate: his detailed discussion of the objective meaning of a legal norm makes a contribution to a more fine-grained understanding of facts about the content of the law, which adds considerable richness in the context of the ground-theoretic discussion of law-determination: Kelsen introduces an abstract account of the

structure of facts about the content of the law under the notion of *imputation* [*Zurechnung*]. On Kelsen's view, imputation describes the linking relation that is expressed by the legal Ought, whose content is stated in the hypothetical sentence of the legal norm [Rechtssatz]: 'If *A* is, the *B* ought to be'. In the 1st edition of the Pure Theory of Law, we read:

> 'The Pure Theory […] [understands] the legal norm as a **hypothetical judgment** that expresses the specific linking of a conditioning material fact with a conditioned consequence. […] Just as laws of nature link a certain material fact as cause with another as effect, so positive laws […] link legal condition with legal consequence […]. If the mode of linking material facts is causality in the one case, it is **imputation** in the other.' (Kelsen, 1992, p. 23)

And a little later:

> 'Expressing this connection, termed 'imputation', and thereby expressing the **specific existence, the validity**, of the law—and nothing else—is the 'ought' in which the Pure Theory of Law represents the positive law. That is, 'ought' expresses the unique sense in which the material facts belonging to the system of the law are posited in their reciprocal relation. In the same way, 'must' expresses the law of causality.' (Kelsen, 1992, p. 24)

A key advantage of rendering legal facts along the lines of imputation is additional clarity about the explanatory task that is involved in law determination. In particular, what would need to be explained – the target legal facts – are no longer characterized in some vague terms, but are given a more concrete structure, that of the hypothetical formulation that is proposed by imputation. This carries over to the explanatory/epistemic demands of law-determination. In other words, when looking for the determinants of law, we are looking for such facts which can direct/guide a thinker to deduce knowledge of the putative legal facts from knowledge of their determinants. Ultimately, the rendering of the structure of the legal explananda in terms of imputation offers significant theoretical guidance when attempting to bridge the gap between legal facts and their grounds.[23]

5.2 A sceptical challenge

[23] See section 5.3.

In line with the now familiar epistemic demands of law-determination, as discussed above, Kelsen directly addresses the question about which of the two meanings is in play, the objective or the subjective. The question gains momentum because the more fundamental determinants, which partly constitute the content the law, *are by themselves incapable of discriminating between subjective and objective meaning*. In Kelsen's words:

> 'The *possible* content of the norm, however, is the same as the *possible* content of an actual event, for the norm refers in its content to this actual event, above all, to human behavior.' (Kelsen, 1992, p. 12)

And elsewhere:

> 'the subjective meaning may […] coincide with the objective meaning attributed to the act in […] the legal system.' (Kelsen, 1992, p. 9)

Kelsen can be helpfully reinterpreted as suggesting that it is (epistemically) possible that there exist multiple mappings from the same set of facts to different subjective meanings, alongside the objective meaning of legal cognition. This is so, because the same set of facts is epistemically compatible with multiple interpretations and there is nothing in the facts themselves capable of determining any mapping as being the correct one. The raises a paradox very similar to the one diagnosed by Kripkenstein earlier.[24] According to the paradox there exist no grounds for opting for the objective meaning of a collection of facts (i.e. the legal content) as opposed to any of the available subjective meanings (i.e. other deviant contents), which epistemically are equally possible as interpretations of the relevant collection of descriptive determinants.

5.3 Kelsen's bridge

The lack of anything supporting the objective over the subjective interpretation of the relevant facts makes it epistemically possible that the putative determinants obtain without the relevant legal facts obtaining. This, as we saw, leads to opacity which ultimately opens up the gap of explanation. I shall now propose understanding Kelsen's way out of the paradox in line with a state-of-the art strategy for bridging explanatory gaps of this kind.

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[24] Section 3, this chapter.

As an antidote to explanatory gaps, the literature has proposed linking principles (call these *bridging principles or bridges*), which aim to restore the transparency of the linking relation between the grounding facts (sources) and the grounded facts (result). Bridging principles purport to provide substantive information for all the concrete transitions from more fundamental sources to less fundamental results in order to make transparent how a less fundamental target is linked to more fundamental sources (Schaffer, 2017, pp. 10n).[25]

Skipping a taxonomy of possible types of explanatory gaps and respective bridges, I will suggest understanding Kelsen's idea of the *basic norm* [*Grundnorm*] as a genuine contribution to the overcoming of the explanatory gap in the domain of law. My proposal is that the Grundnorm represents Kelsen's version of a bridging principle which aims to make epistemically transparent how lower level facts are (explanatorily) linked to legal norms. Accordingly, the Grundnorm can be thought of as a bridging principle for epistemic transparency, which does not require more demanding forms of dependence (e.g. logical entailment).[26] Let me adumbrate the role of the Grundnorm as a bridging principle:

As submitted earlier, the context of explanation of legal norms is opaque, because it is epistemically possible that we can know all the relevant descriptive facts without knowing that the target legal fact obtains. The ensuing explanatory gap is modeled by Kelsen as an Is-Ought gap, whereby it is not possible to derive an Ought-fact (legal norm) from any given set of Is-facts (lower-level facts).[27] Although Kelsen does not use ground-theoretical vocabulary, the strategy he employs for bridging the gap can be recast in ground-theoretic terms. I shall suggest that Kelsen can be usefully understood as arriving at a bridging principle whose role is to create transparency in the context of an inter-level explanation by providing substantive information about the linking relation at work.

For simplicity, Kelsen's bridging strategy can be understood as aiming to develop a model that maps the determinants of law (descriptive facts) onto legal content, i.e. facts with the structure of imputation, as submitted earlier. The model can direct/guide a thinker to deduce knowledge of some concrete legal fact

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[25] Bridging principles, in the context of inter-level explanations, perform the function of linking a source to a result in a transparent manner, i.e. by eliminating opacity in the sense explained earlier. Whether in the case of law, transparency requires a bridging principle that engages moral facts among the explanatia of legal facts is controversial. Kelsen obviously thought that imputation may generate transparency, without making reference to moral facts. A more detailed enquiry into the requirements of inter-level explanations, which involve a transition from non-normative to normative facts, might conclude that something like the prohibition of inferring an Ought form an Is makes additional demands on the structure and content of bringing principles. However, this enquiry must be deferred to a future occasion.

[26] Logical entailment aside, a further version of transparency depends on knowledge of essences as when we can derive knowledge of 'water' from our knowledge of molecules of Hydrogen and Oxygen plus our knowledge of the essence of water (i.e. 'water is H_2O'). This version is equally not required for Kelsenian epistemic transparency.

[27] This requires more unpacking: the opacity that generates the explanatory gap between Ought-facts (legal norms) and Is-facts (non-normative facts) is due to the fact that there exist logically possible mappings from the same source (set of facts) to multiple subjective meanings, which *are not* legal norms.

from knowledge of a concrete collection of descriptive facts, by making it intelligible how the latter determine the former and, consequently, restoring transparency between the two levels of explanation. Now, the complex task of constructing the model can, for the sake of simplicity, be represented as follows.

To begin with, Kelsen's vocabulary supports an interpretation of the Is-Ought gap as one about the demands of inter-level explanation, i.e. the link in virtue of which some collection of descriptive facts (e.g. acts of will and their subjective meaning) contribute to the determination of some fact of objective meaning (a norm):

> 'That an assembly of people is a parliament, and that the result of their activity is a statute (in other words, that these events have this 'meaning'), says simply that the material facts as a whole correspond to certain provisions of the constitution. That is, the content of an actual event corresponds to the content of a given norm.' (Kelsen, 1992, p. 9)

And he explicitly searches for a model capable of constraining possible mappings from descriptive determinants to deviant meanings, with an eye to establishing the required link between those determinants and legal content. In a first step he suggests that 'the norm function[..] as *a scheme of interpretation*' (Kelsen, 1992, p. 10; my emphasis - GP). On one level, the idea of the 'norm as a scheme of interpretation' may serve the function of the requisite model just by relying on the hierarchical structure of a concrete legal order. Recall that Kelsen has – via the notion of 'imputation' – already built the requirement of validity into legal content: i.e. imputation tells us that legal content requires the authorization of some official by a higher norm of the legal order. But, eventually, the idea of validity can only serve as the requisite model up to a point, on pain of an infinite regress. For, sooner or later, the hierarchical series of norms of any legal order will run out.

Ultimately, the idea of the 'norm as a scheme of interpretation' needs to overcome the limitations of any concrete hierarchical series of norms. To deliver the requisite model for constraining deviant mappings and bridging the epistemic gap, Kelsen *must* come up with a conception of the norm that does not itself depend on some pre-existing concrete norm. And that's exactly what he does: he suggests that the norm that can function as the model (or scheme) of interpretation be understood as the abstract formulation of 'objective meaning' that 'authorizes' the transition from more fundamental sources (non-normative facts) to a less fundamental results (objective 'meaning–facts' or norms).

Not to put too fine a point on it, Kelsen's bridging strategy consists in bringing together his idea of imputation as the abstract formulation of objective meaning (i.e. the norm), and the requirement of the 'norm as a scheme of interpretation', with an eye to delivering the model that can bridge the pertinent

epistemic gap. As one would expect, cut off from the context of any concrete legal order, the norm becomes a free-floating, pure instance of imputation which can no longer itself rely on any actual authorization to ground its own 'objectivity'. Its 'objectivity' must be 'postulated' or 'presupposed'. Indeed, Kelsen calls the norm whose objective meaning does not require an earlier authorization, but is logically[28] presupposed, the Grundnorm (basic norm):

> 'A positivistic science of law can only state that this norm is presupposed as a basic norm in the foundation of the objective validity of the legal norms, and therefore presupposed in the interpretation of an effective coercive order as a system of objectively valid legal norms.' (Kelsen 1967, p. 204)

In incorporating objective meaning in an 'ungrounded', 'pure' form, the Grundnorm basically postulates the application of imputation with respect to any actual, functioning legal order. Along these lines, the Grundnorm generates the model that can rule out deviant mappings from any given collection of descriptive facts and provides a bridge that links those facts to legal content (the objective meaning of a legal norm).[29]

Accordingly, imputation is a bridging principle *for epistemic transparency*. Consistent with the programme of Neo-Kantianism, which arguably informs Kelsen's account, imputation is not a principle of the ontological constitution of the objects of the legal discipline (legal norms), but instead a necessary presupposition for the intelligibility of antecedently constituted lower-level materials *qua* legal norms. 'Necessary presupposition' in this context should be understood as an (synthetic) *a priori* principle that makes intelligible how the knowledge of legal facts obtains.[30]

6. Summing up

I began by suggesting that naturalistic accounts of legal phenomena are best understood as metaphysical explanations of how a legal fact obtains in virtue of its more fundamental determinants, consisting of a collection of non-legal, physical or social facts. I then discussed the explanatory constraints implicit in the relation of metaphysical determination and demonstrated how those can generate an argument that

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[28] Kelsen talks about logical presupposition, but it should be clear by now that the Grundnorm is more akin to an *a priori* synthetic proposition, in the sense of a transcendental presupposition of legal cognition.

[29] It is in this sense that Kelsen's controversial claim about legal science *constituting* its object should be interpreted best: i.e. the cognition of legal norms depends on the conditions that make their knowledge intelligible. See (Kelsen, 1928, p. 62) and (Heidemann, 2013).

[30] In Neo-Kantian parlance Kelsen submits that imputation serves the purpose of a necessary presupposition that justifies the possibility of the factum of legal science.

undermines naturalism in a number of domains, including law. Usefully, the same constraints that condemned naturalism were employed to craft a non-naturalist account capable of meeting the demands that metaphysical explanation poses in the legal domain. Kelsen's idea of the Grundnorm proved to be a perfect candidate for this task, both in terms of anticipating the concerns of the ground-theoretic analysis and delivering a philosophically capacious solution that can live up to the standards of contemporary debates in metaphysics.

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